Lee Boon Tin v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO 22-347-1993
VINCENT NG J
28 JUNE 1996

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — Inordinate delay in taking out summons for directions — Limitation period unexpired — Whether delay had prejudiced defendant — Whether there was substantial risk that fair trial would not be possible — Whether court should exercise power to strike out*

The plaintiff filed a writ of summons and statement of claim against the defendants on 23 September 1993. The defendants entered an appearance on 1 October 1993 and on 14 October 1993 the statement of defence was filed. Thereafter, the matter remained in abeyance until 29 August 1995 when the plaintiff's solicitors filed a summons for directions. Meanwhile, on 18 January 1996 the senior assistant registrar acting under O 34 r 8(2) of the Rules of the High Court 1980 issued a notice to attend a show cause on 30 January 1996 for the plaintiff to show cause as to why the suit should not to be struck out for want of prosecution. On that said date, the court after submissions from both counsel made no order on the matter. On 6 February 1996 the defendants filed an application ('the application') to strike out the suit for want of prosecution. On 18 February 1996 the senior assistant registrar heard the summons for directions and made various orders. The defendants' main complaint was that the plaintiff delayed in filing the summons for directions and advanced no explanation for such delay. It was argued that the delay was inexcusable and inordinate. It was also the contention of the defendants that the plaintiff's delay in filing the writ further compounded the plaintiff's delay in filing the summons for directions.

Held, dismissing the application with costs:

(1) The principles governing the inherent powers of the courts to strike out an action for want of prosecution were well settled. An action may be dismissed for want of prosecution in either of two distinct circumstances, ie (i) where a party had been guilty of intentional and contumelious default; or (ii) where there had been inordinate and inexcusable delay in the prosecution of the action (see p 606H–I); *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 MLJ 73 followed.

(2) On the question of inordinate and inexcusable delay, the power should be exercised only where the court was satisfied of the following, namely (i) where there had been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (ii) where the delay had given rise to a substantial risk that it was not possible to have a fair trial of the issues in the action or where the delay was such as was likely to cause or to have caused serious prejudice to the defendants either as between themselves

and the plaintiff or between each other or between them and a third party (see p 607B–C) *Birkett v James* [1978] AC 297, [1977] 2 All ER 801 and *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543 followed. In the instant case, since the defendants' application was grounded on the circumstance of inordinate or inexcusable delay, the defendant then must essentially satisfy the court that the delay has caused such serious prejudice affecting that actual conduct of the trial, or that their business interests have been seriously prejudiced as alleged (see p 607D–E); *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543; *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197; *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150; *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493; *Yong Beng Credit Sdn Bhd v Tia Chong King* [1993] 3 CLJ 502; *Wee Siew Noi v Lee Mun Tuck* [1993] 2 SLR 232 and *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 followed.

(3) In this case there was ex facie inordinate delay by the plaintiff in filing the summons for directions, yet in all the circumstances of the case, though the delay was inordinate, it was not grossly inordinate (see p 608B).

(4) As the delay in filing the summons for directions was ex facie inordinate, it is for the plaintiff to rebut the inference that it was inexcusable. This the plaintiff had failed to do (see p 608C).

(5) Although the defendants had established that the delay was inordinate and inexcusable, such delay per se will not cause the action to be struck off. The defendants must establish the essential element of serious prejudice caused by the delay. The defendants must condescend to or give definite particulars pertaining to serious prejudice to enable the plaintiff to respond. In this case the defendants had failed to show that the delay prejudiced their business interest nor had they shown any loss or damage flowing directly from the delay in prosecution (see p 608I–609A); *United Malayan Banking Corp Bhd v Palm and Vegetable Oil (M) Sdn Bhd* [1994] 3 MLJ 73 followed.

(6) On the question of substantial risk of a fair trial not being possible, the defendants failed to identify the person/persons who were material witnesses who, allegedly had since left the employ of the defendants and now could not be traced. Moreover the material facts in relation to this case were available and have been documented. Therefore, there was no serious prejudice affecting the actual conduct of the trial (see p 610A–D).

(7) Even in the case of pre-writ or post-writ delay, the court has to consider the crucial question of whether serious prejudice against the defendants had been shown. The defendants must show not merely 'something more than minimal additional prejudice' but, rather substantial prejudice suffered or to be suffered as a result

of the delay since to strike out an action is tantamount to driving away a litigant from the judgment seat (see p 610H–611D); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 followed.

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu writ saman dan pernyàtaan tuntutan terhadap defendan pada 23 September 1993. Defendan telah memasukkan kehadiran pada 1 Oktober 1993 dan pada 14 Oktober 1993 pernyataan pembelaan telah difailkan. Selepas itu, tindakan ini dibiarkan sehingga 29 Ogos 1995 di mana peguamcara plaintif telah memfailkan saman meminta arahan. Dalam pada itu, pada 18 Januari 1996, penolong kanan pendaftar dengan bertindak di bawah A 34 k 8(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') telah mengisukan notis tunjuk sebab pada 30 Januari 1996 supaya plaintif menunjukkan sebab mengapa tindakan tersebut tidak patut dibatalkan akibat ketiadaan pendakwaan. Pada tarikh tersebut, setelah mendengar penghujahan daripada peguam kedua-dua pihak, mahkamah tidak mengeluarkan apa-apa perintah. Pada 6 Februari 1996 defendan telah memfailkan suatu permohonan ('permohonan tersebut') untuk membatalkan tindakan tersebut akibat ketiadaan pendakwaan. Pada 18 Februari 1996 saman meminta arahan telah didengar oleh penolong kanan pendaftar dan dia telah memberikan beberapa perintah. Aduan utama defendan adalah bahawa plaintif telah lewat dalam memfailkan saman meminta arahan dan sebarang alasan untuk kelewatan tersebut tidak dikemukakan. Ianya dihujahkan bahawa kelewatan tersebut tidak boleh dimaafkan dan keterlaluan. Juga telah dikemukakan bahawa kelewatan plaintif dalam memfailkan writ saman telah memburukkan lagi keadaan di mana plaintif telah lewat dalam memfailkan saman untuk arahan.

Diputuskan, menolak permohonan ini dengan kos:

(1) Prinsip-prinsip yang menguasai kuasa sedia ada mahkamah untuk membatalkan sesuatu tindakan akibat ketiadaan pendakwaan adalah jelas. Sesuatu tindakan boleh dibatalkan akibat ketiadaan pendakwaan di bawah salah satu daripada dua keadaan yang berasingan, iaitu (i) di mana sesuatu pihak telah melakukan keingkaran yang disengajakan atau yang menghina; atau (ii) di mana terdapat kelewatan yang melampau dan yang tidak boleh dimaafkan dalam pendakwaan tindakan tersebut (lihat ms 606H–I); *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 MLJ 73 diikut.

(2) Mengenai persoalan kelewatan yang melampau dan tidak boleh dimaafkan, kuasa mahkamah patut digunakan hanya jika mahkamah berpuas hati dengan yang berikut, iaitu (i) di mana terdapat kelewatan yang melampau dan tidak boleh dimaafkan di pihak plaintif atau peguamnya; dan (ii) di mana kelewatan tersebut telah membangkitkan risiko yang besar bahawa perbicaraan isu-isu dalam tindakan tersebut tidak boleh dijalankan

dengan adil ataupun di mana kelewatan tersebut mungkin mengakibatkan atau telah mengakibatkan kemudaratan serius kepada defendan, sama ada di antara mereka sendiri dengan pihak plaintif, ataupun di antara mereka sesama sendiri ataupun di antara mereka dengan pihak ketiga (lihat ms 607B–C) *Birkett v James* [1978] AC 297, [1977] 2 All ER 801 dan *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543 diikut. Dalam kes ini, oleh kerana permohonan defendan adalah berdasarkan keadaan di mana terdapat kelewatan yang melampau dan yang tidak boleh dimaafkan, maka defendan mesti memuaskan mahkamah bahawa kelewatan tersebut telah menyebabkan kemudaratan yang serius yang menjejaskan perjalanan perbicaraan tersebut, atau bahawa kepentingan perniagaan mereka telah dimudaratkan dengan serius seperti yang didakwa (lihat ms 607D–E); *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543; *Department of Transport v Chris Samller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197; *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150; *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493, *Yong Beng Credit Sdn Bhd v Tia Chong King* [1993] 3 CLJ 502; *Wee Siew Noi v Lee Mun Tuck* [1993] 2 SLR 232 dan *United Malayan Banking Corporation Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 diikut.

(3) Dalam kes ini, terdapat kelewatan yang melampau ex facie oleh plaintif dalam memfailkan saman untuk arahan, tetapi dalam semua keadaan kes ini, kelengahan ini bukan terlalu melampau (lihat ms 608B).

(4) Oleh kerana kelewatan dalam memfailkan saman untuk arahan adalah melampau ex facie, maka plaintif mempunyai beban untuk membatalkan inferens bahawa ianya tidak boleh dimaafkan. Plaintif gagal berbuat demikian (lihat ms 608C).

(5) Walaupun defendan telah membuktikan bahawa kelewatan tersebut adalah melampau dan tidak boleh dimaafkan, kelewatan demikian sahaja tidak akan menyebabkan tindakan ini dibatalkan. Defendan mestilah membuktikan elemen utama iaitu kemudaratan yang serius yang diakibatkan oleh kelewatan. Defendan mesti sanggup memberikan butir-butir mengenai kemudaratan serius untuk membolehkan plaintif untuk menjawab. Dalam kes ini defendan telah gagal menunjukkan bahawa kelewatan telah memudaratkan kepentingan perniagaan mereka dan mereka juga telah gagal menunjukkan sebarang kerugian ataupun kerosakan langsung akibat daripada kelambatan pendakwaan (lihat ms 608I–609A) *United Malayan Banking Corp Bhd v Palm and Vegetable Oil (M) Sdn Bhd* [1994] 3 MLJ 73 diikut.

(6) Mengenai persoalan risiko yang besar bahawa suatu perbicaraan yang adil tidak boleh diadakan, defendan telah gagal untuk mengenal-pasti saksi-saksi yang penting, yang kononnya telah meninggalkan perkhidmatan defendan dan yang sekarang tidak

boleh dicari. Lagipun fakta-fakta penting berkenaan dengan kes adalah sedia ada dan telah pun dicatitkan. Maka tidak ada sebarang kemudaratan yang serius yang menjejaskan perjalanan perbicaraan tersebut (lihat ms 610A–D).

(7) Walaupun dalam kes kelewatan sebelum writ difailkan ataupun selepas writ difailkan, mahkamah harus mempertimbangkan persoalan yang penting iaitu sama ada kemudaratan serius terhadap defendan telah ditunjukkan. Defendan-defendan mesti menunjukkan bukan sahaja 'sesuatu yang melebihi kemudaratan tambahan yang minima' tetapi kemudaratan besar yang telah dialami ataupun akan dialami akibat kelewatan oleh kerana membatalkan sesuatu tindakan adalah seperti menolak sesuatu pihak dari kerusi penghakiman (lihat ms 610H–611D); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 diikut.]

Notes

For cases on striking out for want of prosecution, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 3652–3655.

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229, [1968] 1 All ER 543
Birkett v James [1978] AC 297, [1977] 2 All ER 801
Biss v Lambeth, Southmark and Lewisham Area Health Authority [1978] 2 All ER 125, [1978] 1 WLR 382
Datuk Samy Vellu v Karpal Singh [1989] 3 MLJ 493
Department of Transport v Chris Smaller (Transport) Ltd [1989] 1 All ER 897, [1989] AC 1197
Negara Properties Sdn Bhd v Arkitek Bersekutu Malaysia (sued as a firm) & Ors [1995] 2 MLJ 185
Te Cheng Hoi v Peh Im Kweng [1994] 2 AMR 1494
United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd [1994] 3 MLJ 73
Vasudevan v Damadoran & Anor [1981] 2 MLJ 150
Wee Siew Nor v Lee Mun Tuck [1993] 2 SLR 532
Yong Beng Credit Sdn Bhd v Tia Chong King [1993] 4 CLJ 502

Legislation referred to

Rules of the High Court 1980 O 34 r 8(2)

M Thayalan (*Meena, Thayalan & Partners*) for the plaintiff.
Raj Shankar (*Rajasingam & Co*) for the defendants.

Vincent Ng J: This is an application by the defendants in encl 7 to dismiss the plaintiff's suit for want of prosecution under O 34 r 2 of the Rules of the High Court 1980 ('the RHC 1980'). Briefly, the facts of this case are as follows.

The plaintiff filed a writ of summons and statement of claim against both the defendants on 23 September 1993 for general, special and exemplary damages for trespass. The defendants entered an appearance on 1 October 1993 and two weeks later, on 14 October 1993, they filed their statement of defence. A

The matter remained in abeyance until 29 August 1995 when the plaintiff's solicitor filed a summons for directions. In the meantime on 18 January 1996, the senior assistant registrar acting under O 34 r 8(2) of the RHC 1980, issued a notice to the parties and their solicitors to attend court on 30 January 1996 for the plaintiff to show cause as to why the suit should not be struck off for want of prosecution. B

On 30 January 1996, the court after hearing submissions from both counsel for the plaintiff and the defendants made no order on the matter. C

The defendants then filed this application on 6 February 1996 to strike out the plaintiff's suit for want of prosecution. On 18 February 1996 the senior assistant registrar heard the summons for directions and ordered the parties to serve on each other a list of documents and to file an affidavit verifying such list within 60 days; that there be inspection of documents within 30 days of service of the list and the filing of the affidavits; and that the estimated length of time for the trial be two days with four witnesses and that the trial be set down for hearing within 30 days. The defendants' main complaint is that the plaintiff had delayed filing the summons for directions and had advanced no explanation for such delay of one year, nine months and three days. According to the defendants this delay was inexcusable and inordinate. Furthermore, the defendants averred that the summons for directions was heard only after the defendants' present application to strike out for want of prosecution. Counsel for the defendants applied for an adjournment of the hearing of the summons for directions but this was refused by the senior assistant registrar. The defendants' counsel then left the chambers of the senior assistant registrar who then proceeded to grant order in terms of the prayers. D E F

The plaintiff's counsel, in his submission, averred that the summons for directions was filed five months before the action was called up by the court to show cause and six months before this present application. The plaintiff's solicitor explained that there was an unfortunate delay on the part of the court staff in fixing the hearing date of the summons for directions. This was, according to plaintiff's solicitor, due to no fault of theirs and that the plaintiff was clearly not guilty of any intentional or contumelious default. G H

The principles governing the inherent powers of the courts to strike out an action for want of prosecution are well settled (see *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 MLJ 73). It is clear that an action may be dismissed for want of prosecution in either of the following two distinct circumstances: I

(1) when a party has been guilty of intentional and contumelious default; or

(2) where there has been inordinate and inexcusable delay in the prosecution of the action.

Counsel for the defendants, Mr Raj Shankar had conceded at the hearing before me that he was abandoning his contention that the plaintiff was guilty of intentional and contumelious default. Hence I will not elucidate on this point.

On the question of inordinate and inexcusable delay, the power should be exercised only where the court is satisfied of the following:

(1) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and

(2) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either between themselves and the plaintiff or between each other or between them and a third party (per Lord Diplock in *Birkett v James* [1978] AC 297, [1977] 2 All ER 801 approving *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543).

The crux of the defendants' complaint is that the plaintiff's delay of one year and nine months in filing the summons for directions is inordinate and inexcusable. This is a matter of fact and degree, which has in the past been decided variously upon the facts peculiar to each particular case that has been brought before the court. The court has also to bear in mind that the issue of delay ought to be considered not necessarily in terms of a single default, unless the delay entailed by the default is grossly inordinate, but normally in the larger context of all the procedural steps required to be taken by the plaintiff.

In *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 MLJ 73, the plaintiff took out the summons for directions after a lapse of more than three years after their appeal to the Federal Court was dismissed. This was further compounded by the fact that the action for trial was only set down two and a half years after the expiry of the period allowed by the court under the order made in the summons for directions. Despite this delay, the Supreme Court refused to allow the defendants' application to strike out the plaintiffs' action for want of prosecution. In *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493, the court allowed the dismissal of the action due to delay of over six years in prosecuting the action since the order was made on the summons for directions. My decision in *Te Cheng Hoi v Peh Im Kweng* [1994] 2 AMR 1484, where there was a delay of three years in filing the statement of claim, is inapplicable here as the decision was clearly grounded on the fact that the plaintiff's conduct was not only contumelious but contemptiously intentional, for his having secured the benefit and use of an injunction for the duration of three years through the filing of a mere generally indorsed writ.

In the instant case it is material to note that the plaintiff's solicitor had already expressed his intention of proceeding with the trial by filing his summons for direction about five months before the court issued the show cause notice to the plaintiff and about six months before the defendant's present application. Furthermore, the defendants here appeared to have displayed some vigour only after the court had issued the notice to show

cause. Moreover, the fact that no order was made at the hearing of the show cause, when the court was informed that the summons for directions had already been filed by the plaintiff over five months before the action was called up by the court to show cause under O 34 r 8(2) of the RHC 1980 would indicate that there was no other undue dilatory conduct on the part of the plaintiff besides the delay in taking out summons for directions.

A

B

After careful reading of the relevant affidavits, I find that there is ex facie inordinate delay on the part of the plaintiff in the filing of the summons for directions, yet in all the circumstances of the case, though the delay on this score is inordinate, it is not grossly inordinate. If the delay is ex facie inordinate, the general rule is that there arises the natural inference that such delay is inexcusable. But, if the delay is ex facie grossly inordinate (eg a delay of many years) then perhaps in my view, the court may draw an inference that such delay is likely to cause or has caused serious prejudice to the defendant (see my obiter dictum in *Te Cheng Hoi v Peh Im Kweng*). Be that as it may, as the delay in filing the summons for directions is ex facie inordinate, it is for the plaintiff to rebut the inference that it is inexcusable. On this score, I would agree with the defendants' contention that the plaintiff has not in his affidavit rebutted the inference that the delay is inexcusable.

C

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Nevertheless, it is the final and vital question of the ingredient of prejudice that I shall now have to address myself.

E

Due to its recognizable element of culpability, if a defendant's application is grounded on the complaint that the plaintiff had been guilty of intentional and contumelious default (not so here), then it would not be essential for the defendant to establish serious prejudice or substantial risk of a fair trial not being possible (see *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors* [1995] 2 MLJ 185 at p 196). However, since in the instant case, the defendants' application was grounded on the second alternative circumstance of inordinate or inexcusable delay, the defendant then must essentially satisfy the court that the delay has caused such serious prejudice affecting that actual conduct of the trial, or that their business interests have been seriously prejudiced as alleged. The essential coupling of delay and prejudice in the high degree as aforesaid has been well settled in England in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543 and *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897 at p 900, para (d), [1989] AC 1197; and also here, in a string of local cases, namely, see *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150, *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493, *Yong Beng Credit Sdn Bhd v Tia Chong King* [1993] 3 CLJ 502, *Wee Siew Noi v Lee Mun Tuck* [1993] 2 SLR 232 and finally the Supreme Court decision in *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73.

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Despite the fact that the defendants have established that the delay is inordinate and inexcusable, such delay per se will not (according to the principles enunciated in the authorities aforesaid) ipso facto cause an action to be struck off. They would nevertheless have to discharge the

onus on them, to establish the essential ingredient of serious prejudice caused by the delay. Furthermore, in order to discharge this onus they would have to consent to or come definitely into particulars pertaining to issue of serious prejudice, to enable the plaintiff to respond.

The defendants quoted the case *Department of Transport v Chris Smaller (Transport) Ltd* where it also held that prejudice entitling a defendant to strike out an action is not confined to prejudice affecting the actual conduct of the trial but includes, inter alia, prejudice to the defendant's business interests, and submitted that there was prejudice to the defendants' business interest caused by the plaintiff's delay.

On this point, the defendants' solicitor contended that the first defendant is a registered trust corporation and that the second defendant is a public company; and thus the plaintiff's suit is a contingent liability bearing upon the business assessment of the defendents' financial status. It is important to bear in mind that it is not in every case against a defendant who is involved in a business that there arises a likelihood of business prejudice so to say. Such an approach would obviously be untenable as it unfairly impinges upon the rights of a litigant in cases against a business concern. Lord Griffiths in *Department of Transport v Chris Smaller (Transport) Ltd* [1989] AC 1197 said this at p 1209:

> ... prejudice may be of varying kinds and is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorize the type of prejudice justifying striking out an action but there can be no doubt that if the defendants had been able to establish significant damage to their business interest, flowing directly from the culpable delay of 13 months after the issue of the writ, a judge would have been entitled to regard it as prejudice justifying striking out the action. I would, however, express a note of caution against allowing the mere fact of the anxiety that accompanies any litigation being regarded as of itself a sufficient prejudice to justify striking out an action. ... [Counsel for the defendants] did not seek to argue that the anxiety occasioned by the extra 13 months in this case should be regarded as a sufficient ground of prejudice to justify making a striking out order. There are, however, passages in some of the judgments that suggest that the mere sword of Damocles, hanging for an unnecessary period, might be a sufficient reason of itself to strike out. On this aspect I repeat the note of caution I expressed in the Court of Appeal in *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at p 124, where I said:
>
> > 'Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice. *Biss*'s case [1978] 2 All ER 125, [1978] 1 WLR 382 is an example of such an exceptional case, the action hanging over for eleven and a half years, with professional reputation at stake.'

Thus, in the current case, applying the principles gleaned from the dicta of Lord Griffiths, I have come to the considered conclusion that the defendants (having through their counsel, Mr Shankar, conceded that the claim in the action was a mere monetary claim for damages that may exceed RM100,000) have not shown how the delay had prejudiced their

business interest, nor had they shown any loss or damage flowing directly from the delay in the prosecution of the plaintiff's action.

On the question of substantial risk of a fair trial not being possible, the defendants have also failed to identify the person/persons who are material witnesses who, allegedly, have since left the employ of the defendants and cannot now be traced. In *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 MLJ 73, the Supreme Court was of the view (see p 80) that key witnesses should be specified and identified. Thus in *Biss v Lambeth, Southmark and Lewisham Area Health Authority* [1978] 2 All ER 125, [1978] 1 WLR 382, upon the peculiar facts of the case, the court was driven to hold that a short delay of a mere nine months in getting the action set down for trial was inordinate and inexcusable because the delay had to be considered in the light of the fact that the action was brought by the plaintiff outside the limitation period (about ten years after the cause of action arose) upon special leave granted by the court under the Limitation Act 1953, and the action was dismissed for want of prosecution upon the court being satisfied that the defendants had suffered serious prejudice and was hopelessly prejudiced as the nurses, who were essential witnesses, had left the hospital (indeed, it was detailed that one had gone to South Africa), their notes have been destroyed and their memories had faded.

The defendants' solicitor also stated that the plaintiff's claim is purely factual and also that memories regarding the event have faded considering that the cause of action occurred in 1987. In this regards looking at the pleadings, especially the statement of defence, which has attached to it a survey report, I would readily agree with plaintiff's counsel that the material facts in relation to this case are available and have been documented. Consequently, after having regard to the above observations and bearing in mind that the prejudice affecting the actual conduct of the trial must be shown to be 'serious', I am not satisfied that the defendants have shown any or any such serious prejudice.

It was the defendants' contention that the plaintiff's delay in filing the writ further compounded the plaintiff's delay in filing the summons for directions. The cause of action arose in 1987 when the plaintiff's premises was pulled down and the plaintiff filed this writ almost six years later in 1993, though well within the limitation period.

In *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197, it was held that where a long delay before the issue of the writ had caused the defendant prejudice, he only had to show something more than minimal additional prejudice as the result of post-writ delay to satisfy the action being struck out. However, it is well settled, upon my reading of authorities closer home, that even in the case of pre-writ and post-writ delay, the court would nevertheless have to consider the crucial question of whether serious prejudice against the defendant has been shown. Indeed, it should be noted that in *Vasudevan v Damadoran & Anor* [1981] 2 MLJ 150, although the plaintiff's writ in that case was issued some ten years after the initial accrual of the cause of

A action (there was a pre-writ delay of ten years and a further seven years' post-writ delay), the Federal Court dismissed the appeal and affirmed the High Court's dismissal of the action upon the crucial ground that the defendants/respondents had 'established the matter of a substantial risk of a fair trial not being possible and of serious prejudice as a result of the B inordinate and inexcusable delay on the part of the appellant. Even in *Chris Smaller*, the requirement was 'to show something more than minimal additional prejudice' rather than just 'minimal additional prejudice'. Furthermore what would constitute that 'something more than minimal additional prejudice' has remained undefined in the English authority. Be that as it may, I am more inclined to adopt the approach taken by our C courts in the authorities adumbrated above as I feel that it is entirely rational and sensible to require the applicant to also show not merely 'something more than minimal additional prejudice' but rather substantial prejudice suffered or to be suffered by him as a result of the delay, since to strike out an action is tantamount to driving away a litigant from the D judgment seat. In any event, considering that the defendants have not consented to any particulars on this specie of prejudice, I find that, other than bare contentions and presumptions, the defendants have also failed to show 'something more than minimal additional prejudice', and for that matter, any prejudice at all arising from the plaintiff's conduct in the action.

E Finally, the defendants' incidental contention that limitation has now set in is a relevant consideration only if this court feels inclined to strike out the plaintiff's action.

Lord Griffiths pointed out in *Chris Smaller*'s case at p 1203 that:

> F ... Although a defendant may well have been prejudiced by this delay and in some cases it may even make it difficult to have a fair trial, these considerations do not justify striking out an action which a plaintiff has commenced within the period of limitation set by parliament. The plaintiff must have been guilty of inordinate and inexcusable delay in the prosecution of the action after the issue of the writ and the defendant must show prejudice flowing directly from the post-writ delay which must be additional G to any prejudice suffered because the plaintiff did not commence his action as soon as he could have done.

In the event, after carefully considering the circumstances of this case and the averments in the affidavit in support of this application, I find no substantial grounds for holding that the defendants have established the H matter of serious prejudice to their business interests, and neither do I find any substantial risk of a fair trial not being possible as a result of the inordinate and inexcusable delay on the part of the plaintiff.

The application by the defendants is therefore dismissed with costs.

I *Application dismissed.*

Reported by Lew Chee Seong